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March 21, 2002

Via Electronic Filing

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20544

RE: Notice of Oral and Written Ex Parte Presentation
Implementation of Section 402(b)(1)(A)
of the Telecommunications Act of 1996
CC Docket No. 96-187

Dear Ms. Salas

On March 20, 2002, Joe D. Edge and Kathleen S. O'Neill, counsel for General Communication, Inc. (GCI") met with Judith A. Nitsche, Lenworth Smith and Joi L. Roberson Nolen, all of the Common Carrier Bureau's Competitive Pricing Division regarding pending Petitions for Reconsideration of the Commission's January 31, 1997 Order Implementing Section 402(b)(1)(A) of the Telecommunications Act of 1996 ("Streamlined Tariff Order") issued in the above-referenced proceeding. GCI expressed its support for the Petitions for Reconsideration filed by AT&T and MCI. Specifically, GCI urged the Commission to reconsider its expansive interpretation of Section 402(b)(1)(A) in the Streamlined Tariff Order on the grounds that the Commission's interpretation is not compelled by the statutory language or legislative history of Section 402(b)(1)(A), and would create an incentive for carrier misconduct.

GCI also urged the Commission to clarify that rate-of-return regulation and enforcement operate independently of the Commission's streamlining procedures and are not eliminated by Section 402(b)(1)(A). In this regard, the parties at the meeting also discussed related arguments made by GCI in a proceeding pending before the United States Court of Appeals for the District of Columbia Circuit.[1] Relevant portions of GCI's brief from that proceeding are attached herewith.

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[1] ACS of Anchorage, Inc. v. FCC, D.C. Cir. No. 01-1059 (filed Feb. 7, 2001).

One copy of this letter is being filed electronically pursuant to 1.1206(b)(2) of the Commission's Rules, 47 C.R.F. § 1.1206(b)(2).

Sincerely yours,

/s/ Joe D. Edge

cc: Judith A. Nitsche
Lenworth Smith
Joi L. Roberson Nolen

ORAL ARGUMENT SCHEDULED FOR MARCH 4, 2002

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1059

ACS OF ANCHORAGE, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

and

GENERAL COMMUNICATION, INC.,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

FINAL BRIEF OF INTERVENOR GENERAL COMMUNICATION, INC.

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increases in local usage minutes since 1995 may be caused by "a growth in the use of the local network to connect to the Internet."[23] Of course, there would be no nexus between the growth of Internet and local usage if ISP traffic minutes were not being counted as intrastate. At the very least, the Commission did not "change" the allocation of local switching costs in the Order, because any change in the allocation would require shifting intrastate costs to the interstate jurisdiction, which is precisely what ATU tried to accomplish with its retroactive change in cost methodology.

II. SECTION 204(a)(3) DOES NOT IMMUNIZE ATU FROM LIABILITY IN DAMAGES FOR ITS 1998 OVEREARNINGS

The Commission's statutory authority to prescribe a rate of return has been recognized for over 25 years and the Commission has been awarding refunds based on this authority for 14 years.[24] Over that time, rate of return carriers subject to overearnings complaints have attempted to avoid liability by arguing, before the Commission and this Court, variations of the same basic theme – that the Commission lacks authority to enforce rate of return prescription and order refunds.[25] Simply put, ATU's "deemed lawful" argument represents the latest incarnation of this theme.

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[23] Jurisdictional Separations and Referral to the Federal-State Joint Board, Recommended Decision, 15 FCC Rcd 13160, 13175-76 (¶ 28) & n.66 (Jt Bd 2000). See also Separations Report and Order, 16 FCC Rcd at 11403 (¶ 42) ("we . . . commit to working with the Joint Board on a continuing basis to address the impact of the Internet and the growth in local minutes during the interim freeze [of the interstate DEM factor]").

[24] See Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) (recognizing the Commission's authority to prescribe rates under section 205 of the Act). See also New England Telephone, 826 F.2d 1101 (recognizing the Commission's authority to prescribe rates and award damages for overearnings under sections 205 and 4(i) of the Act).

[25] See MCI Telecomm. Corp. v. FCC, 59 F.3d 1407 (D.C. Cir. 1995) ("MCI v. FCC") (carriers argued unsuccessfully that earning in excess of the prescribed rate of return "does not by itself constitute a violation of the Communications Act and therefore cannot serve as the sole basis for their damage liability pursuant to § 206"); American Tel. and Tel. Co. v. Northwestern

(continued...)

Having reaped significant overearnings during the 1997-1998 monitoring period and faced with the prospect of reporting and refunding these amounts, ATU concealed its overearnings in its 1997-1998 Monitoring Report by mischaracterizing ISP traffic. ATU now argues that it should not have to disgorge its overearnings for 1998 because the rates in its January 1998 and July 1998 tariffs were filed pursuant to streamlining procedures and are "deemed lawful" under section 204(a)(3).[26] In essence, despite long-standing precedent recognizing the Commission's statutory authority to enforce its rate of return prescription and award refunds, ATU argues that it is immunized, pursuant to Section 204(a)(3), and cannot be held liable in damages for exceeding this prescription. For the reasons set forth below, the Commission reasonably concluded that section 204(a)(3) does not confer such immunity. The Commission reasonably found that in this case, the potential overearnings violation was not ascertainable from the information filed in the January 1998 tariff and the July tariff was not properly filed pursuant to the governing notice requirements of section 204(a)(3).

(..continued)
Bell Telephone Co., 5 FCC Rcd 143 (1990) (AT&T argued unsuccessfully that enforcement of a rate of return prescription constitutes retroactive ratemaking); New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987) ("New England Telephone") (carrier argued unsuccessfully that "no section of the Act empowers the Commission to grant refunds for a violation of prescription" and that granting such a refund would constitute retroactive ratemaking); Nader v. FCC, 520 F.2d 182 (carriers argued unsuccessfully that Commission lacks authority both to prescribe and enforce its rate of return).

[26] Petitioner argues that section 204(a)(3) immunizes it from liability in damages for its 1998 overearnings, not its 1997 overearnings. This posture underscores the bizarre nature of ATU's "deemed lawful" argument since overearnings are assessed over a two year period, in this case, the 1997-1998 Monitoring Period. Indeed, this Court has held that the Commission cannot assess compliance with its rate of return prescription over a period shorter than the two year monitoring period, see Virgin Islands Telephone Corp. v. FCC, 989 F.2d 1231, 1238 (D.C. Cir. 1993) ("VITELCO v. FCC"), and thus it is unclear how the Commission could assess overearnings solely for a single year in a two-year monitoring period.

A. The Commission Reasonably Concluded That Section 204(a)(3) Does Not Immunize ATU From Overearnings Liability With Respect To ATU's January 1998 Tariff

Section 204(a)(3) provides:

> A local exchange carrier may file with the Commission a new or revised charge, classification, regulation or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph [204(a)(1)] before the end of that 7-day or 15-day period, as appropriate.

47 U.S.C. § 204(a)(3) (emphasis added). As the Commission stated in its Order, "under the plain language of section 204(a)(3), a practice can be 'deemed lawful' only if it is 'filed' in a tariff pursuant to the requirements of that section." Order at 23 (¶ 55) (J.A. 872). Because ATU's January 1998 tariff did not disclose any information concerning its unlawful practices,[27] the Commission found that these practices were not "filed" and thus, not "deemed lawful" under the plain language of the statute. Accordingly, consistent with the plain language of the statute, the Commission reasonably concluded that: "section 204(a)(3) does not protect ATU [with respect to its January 1998 Tariff], because ATU's violation of the rate of return prescription was not ascertainable from the information contained in the Tariff." Order at 23 (¶ 54) (J.A. 872) (emphasis added).

The Commission found additional support for its conclusion in the legislative history of section 204(a)(3), its Streamlined Tariff Order implementing section 204(a)(3), and rate of return

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[27] Specifically, ATU unlawfully allocated the costs of ISP traffic to the interstate jurisdiction and counted intraoffice calls as one DEM in calculating its earnings for its 1997-1998 Monitoring Report. By employing these practices, ATU loaded costs into the interstate jurisdiction retroactively revising and inflating its revenue requirement for the 1997-1998 monitoring period. As a result of this unlawful maneuvering, ATU reported a rate of return significantly lower than its actual rate of return and attempted to conceal its overearnings for the 1997-1998 monitoring period.

precedent. Indeed, a review of the legislative history of 204(a)(3) reveals that this statute is aimed at streamlining the tariff filing and review process and not at eliminating enforcement of the Commission's rate of return prescription. As the Commission noted in its Order, "neither the text nor the legislative history of section 204(a)(3) even references, much less vitiates the Commission's long-standing rules concerning liability for rate-of-return violations." Id. at 25 (¶ 59) (J.A. 874). Given the absence of any reference to rate of return regulation in the text and legislative history of section 204(a)(3), the Commission reasonably concluded that it was unlikely Congress intended this provision to confer immunity whenever a carrier violates the Commission's rate of return prescription, as ATU suggests.[28] Indeed, as the Commission noted: "[t]he absence of any discussion by Congress or the Commission of the potential impact of section 204(a)(3) on the rate-of-return prescription strongly suggests that neither Congress nor the Commission intended the drastic change to rate-of-return regulation that ATU argues for here." Id. at 25 (¶ 59) (J.A. 874).

The policy considerations underlying the Commission's implementation of section 204(a)(3) also support the Commission's conclusion that section 204(a)(3) does not confer

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[28] Contrary to ATU's contention, Petitioner's Brief at 37, the Commission rejected the interpretation of section 204(a)(3) urged by ATU — that a LEC is immune from overearnings liability whenever a rate in a streamlined tariff subsequently produces overearnings – and for good reason. ATU's construction of section 204(a)(3) would effectively eliminate rate of return prescription and regulation by immunizing from liability every carrier that files its tariff pursuant to streamlining procedures whether or not the tariff actually provides notice of a potential overearnings violation. Such a construction is entirely unreasonable given the absence of any discussion of rate of return prescription in the text or legislative history of section 204(a)(3). Notably, during the legislative process that resulted in the passage of the Telecommunications Act of 1996, a proposal to eliminate rate of return regulation was introduced in the House, independently of the streamlining proposal. See Communications Act of 1995, H.R. 1555, 104th Cong. § 247 (1995). However, this proposal was not ultimately adopted in the Telecommunications Act of 1996, but rather discarded during the legislative process, lending further credence to the conclusion that Congress did not intend effectively to eliminate rate of return regulation in enacting 204(a)(3).

immunity in instances where the tariff does not provide notice of the unlawful practice. In implementing section 204(a)(3) in its Streamlined Tariff Order, the Commission was mindful of "the balance between [the interests of] consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful." Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Report and Order, 12 FCC Rcd 2170, 2183 (¶ 20) (1997) ("Streamlined Tariff Order"), petition for review docketed, America's Carriers Telecommunications Association v. FCC, D.C. Cir. No. 97-1213 (filed April 1, 1997). The Commission emphasized, in particular, that customers would continue to be able to challenge tariffs in the pre-effective review process.[29] As the Commission recognized in its Streamlined Tariff Order and remarked in its Order, "the pre-effective review of tariff filings protects against the imposition of unjust and unreasonable practices and rates." Order at 24 (¶ 58) (J.A. 873). However, as the Commission observed, "If a carrier does not 'file' in its tariff the practices that will cause an excessive rate-of-return, then the pre-effective tariff review process is rendered futile for purposes of identifying potential rate-of-return violations, rather than merely difficult." Id. at 24-25 (¶ 58) (J.A. 873-74). Plainly, the availability of pre-effective review process is integral to maintaining the balance between the interests of consumers and carriers struck by Congress in enacting section 204(a)(3).[30] Applying this principle to rate of

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[29] Indeed, the Commission noted:

> all parties, including small entities will have the same opportunity to challenge tariff filings eligible for streamlined regulation before they become effective or to initiate a section 208 complaint proceeding after the filings become effective. . . . Small businesses will be able to protect against this possible impact on them caused by "deemed lawful" treatment of LEC tariffs by participating in the pre-effective tariff review process.

Streamlined Tariff Order, 12 FCC Rcd at 2184 (¶ 24).

[30] Plainly, ATU's interpretation of section 204(a)(3) is inconsistent with these policy considerations, and would create an incentive for misconduct by allowing carriers to unlawfully (continued...)

return violations, the Commission reasonably concluded that where, as here, a violation cannot be identified and vetted in the pre-effective review process, section 204(a)(3) cannot be construed to foreclose a customer's only avenue of relief.[31]

As a practical matter, a rate-of-return carrier's tariff will rarely, if ever, provide notice of an overearnings violation and thus, customers of rate-of-return carriers generally will not have the opportunity to challenge a carrier's overearnings during the pre-effective tariff review process. As this Court has remarked, and as the Commission recognized in its Order, projected earnings set forth in a tariff are mere estimates:

> Admittedly, any calculation of the rate that will produce a targeted rate of return, whether the Commission, an IXC does it, or for that matter a LEC, is necessarily but an estimate. It is not possible to know precisely the effect that any given rate, or change from a prevailing rate will have upon revenues (and therefore upon the LEC's rate of return); that depends upon the elasticity of demand for the service, which cannot be known for certain.

MCI v. FCC, 59 F.3d at 1415-16 (internal citations omitted); Order at 23 (¶ 57) (J.A. 872). See also VITELCO v. FCC, 989 F.2d at 1239 ("Given this multitude of inputs, the prospective selection of a tariff that will generate the prescribed rate of return is necessarily an imprecise endeavor"). Accordingly, as the Commission recognized "a carrier's tariff typically will not

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(..continued)
manipulate projections of the relationship between cost and demand in their tariffs and conceal all manner of unlawful practices in tariff filings, without repercussion. Indeed, ATU's assignment of the costs of ISP traffic to the interstate jurisdiction in contravention of established Commission rules is illustrative of precisely the type of manipulation that such a construction of section 204(a)(3) would engender.

[31] Though the plain language of section 204(a)(3) clearly requires ATU to file a practice in order for it to be "deemed lawful," the language does not address or reference rate of return prescription. Because Congress did not speak directly to the effect of section 204(a)(3) on the Commission's rate of return prescription, and delegated to the Commission authority to fill in the gaps, Chevron requires judicial deference to the Commission's reasonable construction of section 204(a)(3). See AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999).

provide notice of a future rate-of-return violation, because it is difficult, if not impossible, to determine, at the time a tariff is filed, whether the rates set forth in the tariff will produce earnings within the prescribed rate of return at some defined point." Order at 24 (¶ 57) (J.A. 873). Indeed, this Court has recognized the difficulties inherent in predicting rate of return violations from information typically contained in tariffs: "If the LEC, with its superior information, could not (or did not) accurately establish such a rate, then it seems obvious that the [customer] could not (or should not be expected to) establish such a rate from the outside looking in." MCI v. FCC, 59 F.3d at 1415.

In this case, the January 1998 Tariff did not provide notice of the overearnings violation. Indeed, the January 1998 tariff did not disclose ATU's unlawful cost-allocation methodology or provide notice of overearnings.[32] Because ATU did not disclose these practices until well after the January 1998 tariff was filed, GCI had no opportunity to challenge ATU's unlawful practices or overearnings during the pre-effective tariff review process. Accordingly, the Commission reasonably concluded, based on the plain language of section 204(a)(3), the legislative history of 204(a)(3), rate of return precedent, and the policy considerations underlying its Streamlined Tariff Order, that section 204(a)(3) does not immunize ATU from liability in damages for its

[32] ATU first disclosed this practice in its preliminary Monitoring Report in March 1998, well after the January 1998 tariff was filed. It is noteworthy that ATU attempts to justify its failure to disclose this practice in its January 1998 tariff by explaining that it did not develop a method of tracking ISP-bound calls until early 1998, after the January 1998 tariff was filed. See Petitioner's Brief at 15. If ATU was not capable of tracking ISP-bound calls until early 1998, ATU could not accurately have tracked ISP-bound calls for the entire 1997-1998 period which began 15 months prior to ATU's "development" of ISP-tracking capabilities. Thus, ATU could not have executed, in good faith, its 1997-1998 Monitoring Report. Form 492 requires carriers to verify that their report "is a correct statement of the business and affairs . . . in respect to each and every matter set forth therein during the specified period" (emphasis added). If ATU did not begin tracking calls to ISPs until early 1998, it could not have had in its possession the information necessary to state in the Monitoring Report that "INTERNET SERVICE PROVIDER TRAFFIC HAS BEEN CATEGORIZED AS INTERSTATE" for the entire 1997-1998 Monitoring Period.

1998 overearnings because its January 1998 tariff did not provide notice of the overearnings violation.

B. The Commission Reasonably Concluded That Section 204(a)(3) Does Not Immunize ATU From Overearnings Liability With Respect To ATU's July 1998 Tariff

The Commission also reasonably concluded that 204(a)(3) does not immunize ATU from overearnings liability with respect to its July 1998 tariff. Pursuant to Section 61.58(a)(2)(i) of the Commission's Rules, and the Commission's Streamlined Tariff Order implementing the procedures for section 204(a)(3), a tariff may be filed on 7 days' notice "only if it proposes a rate decrease."[33] "Any other tariff filed pursuant to section 204(a)(3) of the Communications Act, including those that propose a rate increase or any change in the terms and conditions, shall be filed on 15 days' notice." 47 C.F.R. § 61.58(a)(2)(i). See also Streamlined Tariff Order, 12 FCC Rcd at 2203 (¶ 68). Though ATU indicated for the first time in its July 1998 tariff that it would record all intraoffice calls as one DEM and treat all identifiable ISP traffic as interstate, ATU filed its tariff on only seven days notice instead of 15 days notice, as required. The Commission noted: "it is clear, and the parties do not dispute, that failure to comply with the governing notice requirements renders a tariff ineligible for "deemed lawful" treatment under section 204(a)(3)." Order at 26 (¶ 63) (J.A. 875). See also 1997 Annual Access Tariff Filings, Memorandum Opinion and Order, 13 FCC Rcd 5677, 5705-6 (Com. Car. Bur. 1997) (holding that tariffs filed on eight and 16 days notice were not "deemed lawful"); Streamlined Tariff Report and Order, 12

[33] Notably, as GCI argued before the Commission, ATU July 1998 tariff included an increase in the local switching rate and for this reason the tariff was not validly filed on seven days notice. As GCI noted in the proceedings below, the local switching rate effective January 1, 1998 was $0.01137 and the local switching rate effective July 1, 1998 was $0.011373, an increase in the rate from the previous filing. See GCI Reply at 9-10 (J.A. 686-87). Thus, although the Commission did not render its decision on this basis, ATU's July 1998 tariff failed to comply with the governing notice requirements for this additional reason. See 47 U.S.C. § 204(a)(3).

FCC Rcd at 2181-84, 2189. On this basis, the Commission correctly concluded that the July 1998 tariff was not "deemed lawful" because ATU failed to comply with the governing notice requirements.

Interestingly, ATU and the ITTA challenge the Commission's reasonable interpretation of its own rule arguing that ATU was only required to file on 7-days notice because a change in cost allocation has no impact on the purchasers of the service and is therefore, not a term or condition of service. Indeed, ATU argues: "A bare change in cost allocation methodology, without more, has no impact on any purchaser of tariffed interstate access service absent some corresponding change in the actual rates, terms or conditions of service." Petitioner's Brief at 39-40. ITTA goes even further, asserting that "A change in the way a carrier allocates costs in its backup materials <u>conveys no information</u> to the customer about the manner in which the carrier provides the service, the nature of the service, or the legal obligations assumed by the carrier and its customer in connection with the provision of the service." ITTA Amicus Brief at 22 (emphasis added).

Clearly, a change in cost allocation methodology – at least a change in the cost methodologies at issue in this case – does convey important information and can significantly affect an interstate access customer. Moreover, the suggestion that cost methodologies and backup materials "convey no information" about the service or legal obligations assumed by a carrier only reinforces the conclusion that overearnings violations are difficult if not impossible to predict from information filed in a tariff and that customers must be permitted to seek damages for overearnings at the end of the monitoring period when overearnings can be determined. In any event, the Commission's interpretation of its own notice requirements set forth in 61.58(a)(2)(i) is reasonable and is entitled to substantial deference.[34]

III. THE COMMISSION'S SELECTED PRE-JUDGMENT INTEREST RATE IS CONSISTENT WITH PRECEDENT, REASONABLE, AND DUE DEFERENCE

In the proceeding below, ATU claimed that the lowest I.R.S. corporate interest rate should apply to any damages awarded though the Commission had never previously applied the rate. See Answer of Alaska Communications Systems, Inc. d/b/a ATU Telecommunications Systems Inc. d/b/a Anchorage Telephone Utility, EB-00-MD-016 (filed Sept. 13, 2000) ("ATU Answer") at 20 (J.A. 649); Petitioner's Brief at 23-24 (J.A. 755-56). GCI requested that a higher interest rate than typically awarded be imposed in light of ATU's willful misconduct in this case — reflected in its change of methodologies for calculating its final rate of return with the purpose of concealing overearnings — justified a higher interest rate than typically awarded. GCI Reply at 12-13 (J.A. 689-90); GCI Reply Brief at 17-18 (J.A. 819-20). In the alternative, GCI supported the I.R.S. tax rate for overpayments, which is standard in overearnings cases.[35] The Commission applied the standard I.R.S. rate for tax overpayments. Order at 30 (¶ 74) (J.A. 879).

ATU contends that this finding is capricious because it imposes a "punitive prejudgment interest rate." Petitioner's Brief at 41. The Commission did not mete out a punishment in setting this interest rate, as ATU claims, but instead declined to reward ATU with a lower — and

[34] Chevron, 467 U.S. 837.

[35] GCI Reply at 13 (J.A. 690) (citing Section 208 Complaint Alleging Violations of the Commission's Rate of Return Prescription, Memorandum Opinion and Order and Order on Reconsideration, 12 FCC Rcd 4007 (1997); Litel Telecomm. Corp. v. U S West Communications, Inc., et al., Memorandum Opinion and Order, 9 FCC Rcd 1619, 1626 (1994); MCI Telecomm. Corp. v. Pacific Bell, Memorandum Opinion and Order, 8 FCC Rcd 1517, 1530 (1993)).